



JUTA'S ANNUAL LABOUR LAW SEMINAR

DECEMBER 2011 UPDATE

Dear Juta's Annual Labour Law Seminar attendee

Please accept our Best Wishes for a safe and relaxing Festive Season and a Prosperous 2012. Below are descriptions of cases we think may be of interest. Do enjoy.

Kind regards
Barney, Puke, John, Wayne and Carmen

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TABLE OF CASES IN THE DECEMBER UPDATE

- Can a temporary employee claim dismissal if they are refused a permanent employment?
- Dismissal at the instance of third parties
- Dismissal for alleged murder
- Dismissal for dishonesty
- Unfair labour practice: meaning of 'benefits'
- Selection: decisions must be rational

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FLYNOTES

Proof of dismissal: temporary employment

Whether employees can say that they have been dismissed if they claim a 'reasonable expectation' of permanent employment has long remained moot. Some judges and arbitrators have held that 'temporary' employees can claim to have been dismissed only if they reasonably expected the employer to extend their contracts for a further fixed term. Others have held that this is too limited an approach: if employees on fixed term contracts can claim to have been dismissed when their fixed term contracts are not renewed, why should they not be able to claim to have been dismissed if they are refused permanent employment?

This issue has now been decided by the Labour Appeal Court. After being employed in a series of fixed-term contracts, the respondent employee in *University of Pretoria v CCMA & others* (unreported Labour Appeal Court case no. JA38/10 dated 04/11/2011) applied unsuccessfully for one of a number of permanent posts the university intended to fill. Instead, she was offered a further fixed-term contract, which she declined.

The employee claimed she had been unfairly dismissed because she had a reasonable expectation that she would be employed permanently.

The Labour Appeal Court rejected the employee's argument that section 186(1)(b) of the Labour Relations Act of 1995 was intended to cover such situations. The court found that section 186(1)(b) means precisely what it says: employees can claim a reasonable expectation of renewal only if they are already on fixed-term contracts and if they expected the employer to employ them on a further fixed-term contract.

The court held that if the employee had instituted action because the university refused to give her a further fixed-term contract, she might have had a case. But because her claim related to an indefinite period post, she did not. The appeal was upheld.

Dismissal at the instance of third parties

What does an employer do if informed by the Department of Home Affairs that one of its employees is suspected to be an illegal immigrant and that it faces a massive fine if it continues to employ him?

Dunwell Property Services found itself in this pickle. It fired the employee. Unfortunately for the employer, it transpired that the department had got everything wrong. The department had not proved that the employee was an illegal immigrant, and had not obtained a deportation order.

The Labour Court rejected the employer's argument that it had acted reasonably in the circumstances. In *Dunwell Property Services CC v Sibande & others* (unreported Labour Appeal Court case no. JA7/10 dated 15/09/2011), the Labour Appeal Court agreed.

The LAC found that, even though the employer might have acted in good faith, this was not enough to render the dismissal fair. The fact was that the employee had been afforded no hearing whatsoever, and had not been proved to have false papers, which was the reason given in his termination letter.

The appeal against the Labour Court's finding on review that the dismissal was substantively and procedurally unfair was dismissed.

Dismissal for alleged murder of a colleague

The appellant in *Clarence v National Commissioner of the SA Police Service* (unreported Labour Appeal Court case no. JA46/09, unreported and undated) was dismissed for killing an inebriated colleague with a shot to the head.

The dead police officer had reported for duty under the influence, and had then threatened the patrons of a shebeen before escaping into the veld. A team of police officers was sent to apprehend him, and Clarence claimed to have fired two warning shots before the deceased took aim at him with his firearm.

Charged with misconduct, Clarence claimed that he was merely defending himself, and that he was accordingly not guilty of murder. An SSSBC arbitrator ruled that Clarence had acted in self-defence, and ordered the SAPS to reinstate him. The Labour Court found that the arbitrator had misunderstood the requirements for that defence, and set the award aside.

The Labour Appeal Court found that there was enough evidence before the arbitrator to support a finding that Clarence had indeed acted in self-defence. Since he had been dismissed under a regulation which provided for dismissal for murder, the SAPS was required to prove on a balance of probabilities that self-defence did not apply. It had not done so.

The Court found that Clarence had been unfairly dismissed. The appeal was upheld, and the award confirmed.

Dismissal for misconduct: dishonesty

The respondent employee in *SA Post Office v CCMA & others* (unreported Labour Appeal Court case no. JA56/06 dated 03/08/2011) claimed at her pre-employment interview that she possessed a valid driver's licence, a pre-requisite for the post concerned.

The *Post Office* discovered some months after she was employed that the employee had possessed only a learner's licence at the time of her appointment. She was dismissed. The respondent commissioner and the Labour Court ruled dismissal too harsh a penalty after accepting the employee's claim that the omission of the word 'learner's' from her CV was a mere error.

The Labour Appeal Court found that this was clearly a lie, because the employee had been aware that she would not have been offered the job if she had not claimed that she had a full licence. In yet another judgment indicating the Labour Appeal Court's 'zero tolerance' approach to dishonesty, the dismissal was ruled fair.

Unfair labour practice: meaning of 'benefits'

In *Farhana v Open Learning Systems Educational Trust* (unreported Labour Court case no. JS347/10 dated 29/4/2011) the employee, Farhana, complained that she had been unfairly retrenched and that she had been the victim of an unfair labour practice as she was denied a salary increase whereas all other staff had received increases. The court upheld her first claim of unfair dismissal but dismissed the second claim on the basis that a claim for an increase did not constitute a 'benefit' under the definition of an unfair labour practice. A salary increase is an economic demand and should not form the basis of an unfair labour practice claim as this would have the effect of undermining collective bargaining. In any event, even if she had been able to show that she had been the victim of an unfair labour practice, this was a matter to be dealt with by the CCMA, not the Labour Court.

Selection: decisions must be rational

In the case of *City of Tshwane v Engineering Council of SA and Weyers* [2010] 3 BLLR 229 (SCA) the court dismissed the City of Tshwane's appeal against a judgment of the High Court in which it held that its threat to dismiss *Weyers* for blowing the whistle on the City's decision to appoint unqualified electricians was unlawful in terms of the Protected Disclosures Act. One would have thought that the City had learnt its lesson after that loss, but a similar thing happened in the matter of *City of Tshwane v SALGBC* (unreported Labour Court case no. JR593/07 dated 26/5/2011). This case concerned the appointment of a manager for bulk purchases in the electricity department. This time the complainant was not a whistleblower but an unsuccessful candidate who possessed a degree in electrical engineering, whereas the successful candidate did not. The unsuccessful candidate claimed further that none of the members of the selection panel had the qualifications or experience necessary to judge between candidates and that their scores during the interview indicated a collective bias towards the successful candidate.

The commissioner at the relevant bargaining council concluded that the unsuccessful candidate had been treated unfairly and ordered the municipality to promote him to the post from the date he should have been appointed, ie. three years earlier. The Labour Court upheld the commissioner's finding that the appointment of the successful candidate had been arbitrary and based in bias on the part of the selection committee. The result was that the unsuccessful candidate had been treated unfairly in the circumstances. However, the court found that he should have been granted 'protected' promotion in terms of the rules applicable to local government instead of being placed in the relevant post. The municipality also had to pay him the difference in salary between the higher post and his current one.